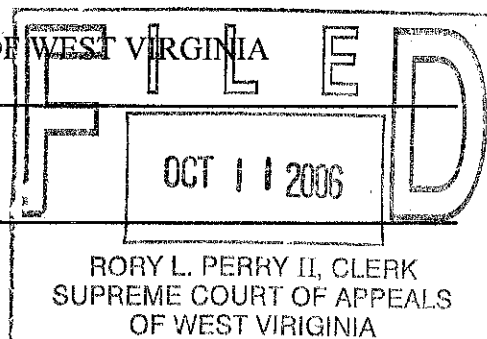


No. 33091

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



DANIEL R. STRAHIN,

Appellant,

v.

Civil Action No.: 99-C-7

**FARMERS & MECHANICS INSURANCE
COMPANY OF WEST VIRGINIA, INC.,**

Appellee.

FROM THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
THE HONORABLE ALAN D. MOATS, CIRCUIT JUDGE

**BRIEF OF APPELLEE, FARMERS AND MECHANICS
MUTUAL INSURANCE COMPANY OF WEST VIRGINIA, INC. ,
IN RESPONSE TO BRIEF OF APPELLANT, DANIEL STRAHIN**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Farmers and Mechanics Mutual Insurance Company of West Virginia, Inc.'s
Statement of the Kind of Proceeding and Nature of the Ruling below**

The Appellant herein, Daniel Strahin (hereinafter sometimes referred to as "Strahin") and his parents, James A. Strahin and Willa Strahin, instituted suit in the Circuit Court of Barbour County, West Virginia against Robert Glenn Cleavenger, Larry Cleavenger, Jr. and Mary Cleavenger, as well as against Earl Sullivan (hereinafter sometimes referred to as "Sullivan"). The suit, filed around February, 1999, arose from a shooting incident which occurred in Barbour County, West Virginia, on or about May 31, 1998.¹

The underlying claim of Strahin against, *inter alia*, Sullivan proceeded through litigation before the Circuit Court, with a resulting jury trial conducted in March, 2002. At that time, the jury returned a verdict in favor of Strahin against Sullivan in the amount of \$1,060,556.00.

After the jury verdict, but prior to this Court's opinion in Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004), Strahin filed a Motion to Amend his complaint in this matter and the same was granted by the Circuit Court. Strahin then filed his Amended Complaint, asserting claims against Farmers and Mechanics for a Shamblin cause of action, as well as statutory and common law bad faith. Strahin asserts that he and Sullivan "entered into an *Assignment and Covenant Not to Execute* prior to verdict whereby Sullivan assigned the excess judgment against Farmers & Mechanics." *Brief of the Appellant at 3*. However, a fair reading of the Assignment and

¹There are many parties and procedural steps taken with respect to the instant matter. Accordingly, Farmers and Mechanics Mutual Insurance Company of West Virginia, Inc. ("Farmers and Mechanics") has limited the facts and procedural history presented herein to that relevant to the Circuit Court's June 17, 2005 Order.

Covenant Not to Execute (hereinafter sometimes referred to as the "Assignment") demonstrates that Shamblin is not specifically mentioned, nor is the right to recover any excess judgment, most notably because, at the time the Assignment was entered into, there was no excess judgment against Sullivan.

Action on the Amended Complaint was stayed pending the appeal of the underlying jury verdict to this Court. This Court having issued its opinion upholding application of joint and several liability with respect to the jury verdict against Sullivan, *see Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004), Farmers & Mechanics tendered payment of the policy proceeds to Strahin in the amount of \$100,000.00, as well as appropriate interest on said amount as calculated and agreed to by counsel for the respective parties.

The Circuit Court also established a time frame within which Farmers and Mechanics was to answer or otherwise plead to the allegations contained within Strahin's Amended Complaint. Thereafter, on January 5, 2005, Farmers and Mechanics filed its Answer to Strahin's Amended Complaint. At that same time, Farmers and Mechanics filed its motion for summary judgment, seeking judgment, as a matter of law, only as to Strahin's Shamblin cause of action. A hearing was held before the Circuit Court on February 4, 2005, at which time the Circuit Court observed that a hearing had been held on February 7, 2001 in the captioned matter seeking Court approval of the Assignment and Covenant Not to Execute. As counsel for neither party had previously had the opportunity to review the transcript from the February 7, 2001 hearing, as present counsel for the parties had not been involved in or present at the February 7, 2001 hearing, the Circuit Court directed Farmers and Mechanics to obtain a copy of the February 7, 2001 hearing transcript and to provide a copy of the same to Strahin's counsel. Farmers and Mechanics complied with the Circuit Court's directive.

After additional briefing by the parties, upon receipt of the February 7, 2001 hearing transcript, the Circuit Court conducted a further hearing on Farmers and Mechanics' motion for summary judgment, on April 8, 2005, at which time the Circuit Court granted Farmers and Mechanics' motion for summary judgment. The Circuit Court's rulings are reflected in the June 17, 2005 Order, said Order giving rise to Strahin's present appeal.

Because Strahin's Shamblin claim clearly lacks the essential legal elements of such a claim, as a matter of law, and, further, because Farmers and Mechanics was not "legally obligated" to pay any monies to Strahin as its insured was not "legally obligated" to pay, pursuant to the Assignment and Covenant Not to Execute, the Circuit Court of Barbour County, West Virginia correctly granted Farmers and Mechanics' motion for summary judgment. Accordingly, it is respectfully requested that this Honorable Court, applying a *de novo* review, affirm the June 17, 2005 Order of the Circuit Court.

**Farmers and Mechanics Mutual Insurance
Company of West Virginia, Inc.'s Statement of Facts**

In or about February, 1999, Strahin, along with his parents, James A. Strahin and Willa Strahin, instituted suit in the Circuit Court of Barbour County, West Virginia against Robert Glenn Cleavenger, Larry Cleavenger, Jr. and Mary Cleavenger, as well as against Earl Sullivan. The suit arose from a shooting incident which occurred in Barbour County, West Virginia, on or about May 31, 1998. The factual circumstances surrounding the underlying shooting incident were developed before this Court and are addressed in the Court's prior opinion in Strahin v. Cleavenger, *supra*.

At the time of the May 31, 1998 incident, Sullivan was insured by a policy of homeowners' insurance issued by Farmers and Mechanics, that being Policy No. HPR000-8548-0101, with limits of \$100,000.00. In addition to the Farmers & Mechanics policy of insurance, Sullivan was also insured, at the time of the May 31, 1998 incident, by a policy of automobile insurance issued by Erie Insurance Company ("Erie"), that being Policy No. Q01-7203601.

As a part of the civil action, entitled Daniel R. Strahin, James A. Strahin and Willa Strahin, Plaintiffs v. Robert Cleavenger, Larry Cleavenger, Jr., Mary Cleavenger, and Earl Sullivan, Civil Action No. 99-C-7, the named plaintiffs and the defendant, Earl Sullivan, entered into the referenced Assignment and Covenant Not to Execute. Erie, as the automobile liability insurance carrier for Sullivan, was also a party to the Assignment.

Pursuant to the terms of the Assignment, the plaintiffs, including Strahin, received, *inter alia*, \$25,000.00, said sum representing the limits of the bodily injury liability coverage under the Erie policy of insurance issued to Sullivan. *See Assignment at ¶ I.* The Assignment also contemplated the

parties desire to compromise and settle Plaintiffs' claims against Earl Sullivan to the extent that such claims are enforceable and payable from the limits of the Erie Policy and the personal assets of Earl Sullivan, while preserving all rights, whether currently existing or arising in the future, to collect against Farmer's [sic] & Mechanics Policy, Farmers & Mechanics Mutual Insurance Company, and Nationwide Insurance Company.

See Assignment. Furthermore, the plaintiffs, including Strahin, received an assignment from Sullivan, whereby Sullivan assigned to the

Plaintiffs, their heirs, all representatives and assigns, all of his rights, presently existing or which might hereafter arise, whether in contract or tort, to seek compensation, indemnity, defense, compensatory damages, punitive damages, relating to or arising from the Farmers & Mechanics Policy, including but not limited

to all claims based on unfair settlement practices, Bad Faith, or result to provide defense and/or indemnity.

See Assignment at ¶ II. In exchange for the monies and assignment from Sullivan, the plaintiffs, including Strahin, agreed not to execute upon any of the personal assets of Sullivan to recover payment to satisfy any judgment which may be acquired against Sullivan. The Assignment also provided that it was expressly understood by the plaintiffs that the plaintiffs shall not satisfy any such judgments against the personal assets of Sullivan. *See Assignment at ¶ V.* As further conditions of the Assignment, the parties thereto agreed that

... (b) Any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan, shall not be at any time recordable by any party nor at any time become recordable in any county clerk's office in West Virginia or in any other place where it would become a public document; (c) Any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan shall be self-extinguishing and satisfied in full at the conclusion of five (5) years from any judgment and the date of entry of any such judgment; ... (e) If during the five (5) years that any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan is in effect, any monies are recovered on behalf of plaintiffs against Farmers & Mechanics Mutual Insurance Company ... recovery under both would operate as a full and complete satisfaction of any such judgment; (f) Plaintiffs are now and forever prohibited from making any attempt of any kind to satisfy any judgment obtained from the personal assets of Earl Sullivan ...

See Assignment at ¶ VI.

During the course of the underlying litigation against Sullivan and others, the plaintiffs, including Strahin, presented a settlement demand to Farmers and Mechanics to resolve their claims against Sullivan. However, Farmers & Mechanics did not, prior to trial, settle the plaintiffs' claims against Sullivan for the \$100,000.00 policy limits. Instead, Farmers and Mechanics complied with its contractual obligation and provided a defense to its insured, Sullivan, in a case where Sullivan's liability was not reasonably clear, particularly where it took an opinion from this

Court and the creation of a new syllabus point addressing joint and several liability in a situation involving an intentional criminal act and a negligent act.²

Thereafter, in March, 2002, the underlying trial was conducted in this matter resulting in a verdict in favor of Strahin against Sullivan in the amount of \$1,060,556.00. At the time this jury verdict against Sullivan was rendered, Sullivan's personal assets were not at stake whatsoever as the Assignment and Covenant Not to Execute had been previously executed. Furthermore, the Assignment and Covenant Not to Execute further precluded Strahin from ever recording any judgment against Sullivan. In any event, it was this jury verdict against Sullivan which was the subject of the issues and arguments addressed in Strahin v. Cleavenger, *supra*.

After the jury verdict, but prior to this Court's opinion in Strahin v. Cleavenger, *supra*, Strahin was granted leave by the Circuit Court to amend his Complaint, which Amended Complaint included claims against Farmers & Mechanics for a Shamblin cause of action, as well as common law and statutory bad faith.³ Action on the Amended Complaint was stayed pending the appeal of the underlying jury verdict to this Court. This Court having issued its opinion upholding application of joint and several liability with respect to the jury verdict against Sullivan, *see Strahin*

²Strahin asserts that Sullivan assigned to him the Shamblin claim which was asserted in the Amended Complaint. *Brief of the Appellant at 3, 8*. However, the Court must be cognizant of the fact that the Assignment was not limited to a Shamblin claim, despite Strahin's assertion that "the very purpose of the Assignment" was the assignment of a Shamblin cause of action from the insured to the prevailing Plaintiff. *Brief of the Appellant at 17*. Indeed, the Assignment also included an assignment by Sullivan to Strahin of any unfair settlement practices arising under the West Virginia Unfair Claims Settlement Practices Act, as well as any other claim under the common law for bad faith.

³Strahin consistently attempts to use interchangeably the term "Bad Faith" with a Shamblin cause of action. However, a common law bad faith claim could arguably exist without a Shamblin excess verdict. For instance, a common law bad faith claim could also include a claim against the insurance carrier where the carrier refused to provide a defense for its insured, in complete derogation not only of its contractual duty, but also its common law duty.

v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004), Farmers & Mechanics tendered payment of the policy proceeds to Strahin in the amount of \$100,000.00, including the appropriate interest on said amount.

On January 5, 2005, Farmers and Mechanics filed its Answer to Strahin's Amended Complaint, while, at the same time, filing its motion for summary judgment, seeking judgment, as a matter of law, as to Strahin's Shamblin cause of action. After additional briefing by the parties, upon receipt of the February 7, 2001 hearing transcript, the Court conducted a further hearing on Farmers and Mechanics' motion for summary judgment, on April 8, 2005, at which time the Circuit Court granted Farmers and Mechanics' motion for summary judgment. The Circuit Court's rulings are reflected in the June 17, 2005 Order. Succinctly stated, those undisputed facts clearly supporting the June 17, 2005 Order are: that Farmers and Mechanics did not settle Strahin's claims within policy limits; that, in exchange for the Assignment from Sullivan, Strahin agreed not to execute upon any of Sullivan's personal assets to recover payment to satisfy any judgment which may be acquired against Sullivan; that any judgment obtained against Sullivan subsequent to the Assignment could not be recorded and was, in fact, self-extinguishing; and, that, as a result of the Assignment and Covenant Not to Execute, Sullivan's personal assets were not at stake at the time the jury awarded its verdict in favor of Strahin in the amount of \$1,060,556.00. Based on these undisputed facts, Farmers and Mechanics respectfully submits that the Circuit Court correctly granted its motion for summary judgment.

Standard of Review

Appellate review of a circuit court's order granting a motion for summary judgment is *de novo*. Stonewall Jackson Memorial Hospital v. American United Life Insurance Company, 206

W. Va. 458, 525 S.E.2d 649 (1999); Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). Thus, this Court will review an award of summary judgment by the Circuit Court under the same standards that the Circuit Court initially applied to determine whether summary judgment was appropriate. Williams v. Precision Coil, 194 W. Va. 52, 459 S.E.2d 329 (1995).

Strahin's brief also includes a standard of review relating to the interpretation of an insurance contract, *Brief of the Appellant at 4*, presumably premised on the later assertion that the "legally obligated to pay" language in the Farmers & Mechanics policy of insurance is ambiguous at best. *Brief of the Appellant at 24*. However, this position was not advanced before the Circuit Court below and, further, was absent from the Petition for Appeal previously filed by Strahin with this Court. Thus, this Court should not give due consideration to any assertion that the "legally obligated to pay" language in the Farmers & Mechanics insurance policy is ambiguous. See Estep v. Brewer, 192 W. Va. 511, 453 S.E.2d 345 (1994)(the court will not consider an error which is not preserved in the record nor apparent on the face of the record); Kanawha Valley Labor Council v. AFL-CIO, 667 F.2d 436 (4th Cir. 1985)(customarily, a failure to raise a point below precludes its consideration on appeal).

Points and Authorities

I. The Circuit Court of Barbour County, West Virginia Committed No Error in Granting Farmers & Mechanics' Motion for Summary Judgment as to Plaintiff's "Shamblin" Claim Where Said Claim Fails, as a Matter of Law, for the Reason That the Essential Legal Elements of Such a Claim Are Lacking.

Shamblin v Nationwide Mutual Insurance Company, 183 W. Va. 585, 396 S.E.2d 766 (1990);

Charles v. State Farm Mut. Auto Ins. Co., 192 W. Va. 293, 452 S.E.2d 384 (1994);

Foremost County Mutual Ins. Co. v. The Home Indemnity Co., 897 F.2d 754 (5th Cir. 1990);

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Safeway Moving & Storage Corp. v. Aetna Ins. Co., 317 F. Supp. 238 (E.D. Va. 1970);

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Kobbeman v. Oleson, 1998 SD 20, 574 N.W.2d 633 (1998);

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Hernandez v. Great American Ins. Co of New York, 464 S.W.2d 91 (Tex. 1971);

Willcox v. American Home Assurance Co., 900 F. Supp. 850 (S.D. Tex. 1995);

Romstadt v. Allstate Ins. Co., 844 F. Supp. 361 (N.D. Ohio. 1994);

McCormick v. Allstate Insurance Company, 197 W. Va. 415, 475 S.E.2d 507 (1996);

Dodrill v. Nationwide Mutual Insurance Company, 201 W. Va. 1, 491 S.E.2d 1 (1996);

II. The Circuit Court's Granting of Summary Judgment to Farmers & Mechanics Was Proper for the Additional Reason That When an Insured Is Completely Protected from Personal Liability to a Third-party Claimant by a Covenant Not to Execute, the Insurance Carrier Is Not under Any Duty to Pay the Excess Judgment Against the Insured since the Insured Is No Longer Legally Obligated to Pay the Judgment.

Buchanan v. Buchanan, 83 N.C. App. 428, 350 S.E.2d 175 (N.C. Ct. App. 1986);

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Oregon Mutual Ins. Co. v. Gibson, 88 Ore. App. 574, 746 P.2d 245 (Ore. Ct. App. 1987);

Bendall v. White, 511 F. Supp. 793 (N.D. Ala. 1981);

Huffman v. Peerless Ins. Co., 17 N.C. App. 292, 193 S.E.2d 773 (N.C. Ct. App. 1973), *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973);

Whatley v. City of Dallas, 758 S.W.2d 301 (Tex. Ct. App. 1988);

Willcox v. American Home Assurance Co., 900 F. Supp. 850 (S.D. Tex. 1995);

In Re: Tutu Water Wells Contamination Litigation, 78 F. Supp. 2d 423 (D. V.I. 1999);

Far West Federal Bank, S.B. v. Transamerica Title Ins. Co., 99 Ore. App. 340, 781 P.2d 1259 (Ore. Ct. App. 1898);

Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 570 (2004);

Lancaster v. Royal Ins. Co. of America, 302 Ore. 62, 726 P.2d 371 (1986);

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Ackerman v. Travelers Indem. Co., 456 S.E.2d 408 (S.C. App. 1995);

Kagele v. Aetna Life and Cas. Co., 698 P.2d 90 (Wash. App. 1985);

Steil v. Florida Physicians' Ins. Reciprocal, 448 So. 2d 589 (Fla. App. 2d Dist. 1984);

American Family Mut. Ins. Co. v. Kivela, 408 N.E.2d 805 (Ind. App. 1st Dist. 1980);

State Farm Mutual Automobile Ins. Co. v. Paynter, 593 P.2d 948 (Ariz. App. Div. 1 1979);

The Midwestern Indem. Co. v. Laikin, 119 F. Supp. 2d 831 (S.D. Ind. 2000);

State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996);

Clock v. Larson, 564 N.W.2d 436 (Iowa 1997);

Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 128 (D.C. Cir. 1989);

Wanger v. Lerol, 670 N.W.2d 830 (N.D. 2003);

Stateline Steel Erectors, Inc. v. Shields, 150 N.H. 332, 837 A.2d 285 (2003);

Ayers v. C&D General Contractors, 269 F. Supp. 2d 911 (W.D. Ky. 2003);

Franco v. Selective Ins. Co., 184 F.3d 4 (1st Cir. 1999);

Tip's Package Store v. Commercial Ins. Managers, Inc., 86 S.W.3d 543 (Tenn. Ct. App. 2001);

Campione v. Wilson, 661 N.E.2d 658 (Mass. 1996);

McLellan v. Atchison Ins. Agency, Inc., 912 P.2d 559 (Haw. Ct. App. 1996);

Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637 (Iowa 2000);

Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958).

Argument

I. The Circuit Court of Barbour County, West Virginia Committed No Error in Granting Farmers & Mechanics' Motion for Summary Judgment as to Plaintiff's "Shamblin" Claim Where Said Claim Fails, as a Matter of Law, for the Reason That the Essential Legal Elements of Such a Claim Are Lacking.

Certain positions advanced by Strahin in his brief must be disposed of at the outset.

Notably, Strahin devotes a significant portion of his brief to support the proposition that the assignment of an insurance bad faith claim is commonplace and accepted in the State of West Virginia. *Brief of the Appellant at 11-13*. However, Farmers & Mechanics did not assert before the Circuit Court below that a "bad faith" claim cannot be assigned by the insured to a third-party. To the contrary, Farmers & Mechanics asserted that Sullivan, as the assignor, could only assign to Strahin, the assignee, whatever those interests were against Farmers & Mechanics. Strahin ultimately recognizes this, stating that "Farmers & Mechanics concedes that West Virginia law supports the assignment of a first-party bad faith claim . . ." *Brief of the Appellant at 12*. All in all, then, whether West Virginia permits the assignment of a bad faith claim, a Shamblin-like claim, or any other claim regarding the common law duty of good faith and fair dealing, is a non-issue for purposes of this appeal.

Strahin's brief also contains numerous assertions, contentions and opinions regarding the issue of an assignment of a bad faith claim coupled with a covenant not to execute. *Brief of the Appellant at 13-15*. Again, Farmers & Mechanics has not asserted that a bad faith claim cannot be assigned if there is also in existence a covenant not to execute. What must be pointed out at this juncture, then, is that a "bad faith" claim is not limited to a Shamblin-like claim. Indeed, many of the cases cited by Strahin included bad faith claims against the insurer for failure to defend – not

failure to settle. A failure to defend claim could include, but would not fail without, an excess verdict. For instance, the insured may have a viable claim against his insurance carrier for failure to defend, but that failure did not result in any excess verdict against the insured. Nonetheless, this discussion and Strahin's use of the purported "majority" versus "minority" rule regarding covenants not to execute should not detract from the central issue before this Court under Shamblin. Instead, the referenced discussion is more aptly addressed in the context of the "legally obligated to pay" finding of the Circuit Court, which will be addressed *infra*. Indeed, the Circuit Court's award of summary judgment to Farmers & Mechanics consisted of an additional, yet independent, ground regarding the "legally obligated to pay" language in the Farmers & Mechanics policy of insurance. This is an independent ground separate and distinct from the Circuit Court's findings and conclusions regarding the essential legal elements of a Shamblin cause of action.

Leaving aside for the moment, then, the independent and alternate ground supporting Farmers & Mechanics' motion for summary judgment, i.e., the "legally obligated to pay" argument, which will be addressed *infra*, the central issue in this appeal is whether Strahin, standing in the shoes of Sullivan, the assignor and Farmers & Mechanics insured, can satisfy the essential legal elements of a Shamblin claim. The Circuit Court found that Strahin could not, thereby entitling Farmers & Mechanics to summary judgment on this claim and this claim alone – remember, that Strahin was assigned any and all claims of Sullivan and has so asserted such claims, including common law and statutory bad faith claims against Farmers & Mechanics.

In Shamblin v. Nationwide Mutual Insurance Company, 183 W. Va. 585, 396 S.E.2d 766 (1990), this Court adopted a hybrid negligence-strict liability standard in causes of actions against insurance carriers for failing to settle third party liability claims within the policy limits.

Despite Strahin's assertion before the Circuit Court of a "strict scrutiny standard", this Court held that

[w]herever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits **would release the insured from any and all personal liability**, that the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured.

Id., 396 S.E.2d at 776 (emphasis added). The premise, therefore, behind the Shamblin doctrine was to protect policyholders from insurer misconduct. "[I]t is beyond cavil that the . . . Shamblin doctrine was created to protect policyholders who purchase insurance to safeguard their hard-won personal estates and then find these estates needlessly at risk because of the intransigence of an insurance carrier." Charles v. State Farm Mutual Automobile Insurance Company, 192 W. Va. 293, 298, 452 S.E.2d 384 (1994). This cause of action prevents an insurance carrier from playing "you bet my house" when considering a claim settlement. Shamblin, 396 S.E.2d at 780 (Neely, J. concurring).

The assignment of a purported Shamblin cause of action is not an entitlement to recovery. This Court in Shamblin specifically declined to adopt a strict liability standard of recovery where an insurer would be liable any time a refusal to settle is later found to be wrongful, regardless of the reasonableness of such refusal. Id., 396 S.E.2d at 773. Instead, this Court chose to adopt a negligence prong to the standard and **require proof that the insurer acted in bad faith toward the insured which exposed the insured to personal liability in excess of policy limits.** Id., 396 S.E.2d at 777. The standard adopted in Shamblin is essentially "a hybrid negligence-strict liability" theory of recovery. Id., 396 S.E.2d at 776.

Since a Shamblin cause of action is grounded partly in negligence, the doctrine suggests that refusal to accept a settlement offer, without more, does not automatically equal a bad faith award of damages to the insured; **there must not only be negligent refusal to settle by the insurer, but also subsequent harm to the insured.** See Foremost County Mutual Ins. Co. v. The Home Indemnity Co., 897 F.2d 754 (5th Cir. 1990)(applying Texas law). As with any negligence action, a plaintiff must have suffered some injury proximately caused by the defendant's breach of a duty. Thus, if the insured suffers no injury, i.e., no excess verdict against him, as a result of the insurer's conduct, the insured does not possess a cause of action against his insurer. See Gainsco Ins. Co. v. Amoco Prod. Co., 2002 Wyo. 122, 53 P.2d 1051, 1061 n.3 (2002)(court observed that "the existence of an excess judgment is a required element of the tort of third party bad faith . . . we resisted an invitation to extend third party bad faith situations in which an excess judgment does not exist.").

The undisputed facts in this case, as found by the Circuit Court, amply demonstrate that this necessary and essential legal element is clearly lacking in the instant matter. Thus, when an insured is protected from any personal liability by the execution of a covenant not to execute with the plaintiff, the insured's "hard-won personal estate" is not in jeopardy when an insurer refuses an offer of settlement. He has suffered no injury by the insurer's refusal to settle. Furthermore, Shamblin expressly states that the insurer has *prima facie* acted in bad faith when a settlement offer was rejected **"and where such settlement within policy limits would release the insured from any and all personal liability."** Shamblin, 396 S.E.2d at 777 (emphasis added). The covenant not to execute has already shielded the insured's assets from exposure to liability and any conduct on behalf of the insurer cannot result in harm to the insured, assuming, of course, that the insurer is

providing a defense to its insured. The elements of a Shamblin cause of action are simply not satisfied.

Strahin contends that Shamblin contains no requirement that the insured's assets be at stake at the time the excess verdict is returned. However, this contention ignores this Court's language in the Shamblin opinion itself and the further discussion in Charles regarding concern for the insured's "hard-won personal estates." This contention further ignores the following scenario: the insured enters into an assignment of a Shamblin claim to the injured plaintiff prior to any excess verdict; upon trial of the plaintiff's claims against the insured, the jury either returns a defense verdict in favor of the insured, which results in no excess verdict against the insured, or the jury returns a verdict against the insured within the applicable policy limits, thus, again, resulting in no excess verdict against the insured. Under either version of this scenario, the assignee/plaintiff, standing in the shoes of the assignor/insured, would have no viable claim against the carrier under Shamblin because there would be no excess verdict and the insured's personal assets would, therefore, not be at stake.

Strahin also asserts that "[i]t should make no difference whether an assignment of a Shamblin claim precedes or follows an excess verdict. *Brief of the Appellant at 22*. The timing of such an assignment clearly makes a difference, as is demonstrated by the above scenario. *See also, Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990)(court specifically distinguished between the timing of the assignment and covenant not to execute in the case before it and in Henson v. Porter, 772 P.2d 778 (1989); in Glenn the assignment was after the verdict, while in Henson the assignment was before the verdict). Further, in In Re: Tutu Water Wells Contamination Litigation, 78 F. Supp. 2d 423 (D. V.I. 1999), the court addressed the timing of the assignment:

Numerous jurisdictions in the United States have held insurers liable to the insured for amounts in excess of policy limits when the insurer's breach of its duty to defend has resulted in an excess verdict against the insured. See, e.g., Newhouse Citizens v. Security Mut. Ins. Co., 176 Wis. 2d 824, 501 N.W.2d 1, 7 (Wis. 1993); Safeway Moving & Storage Corp. v. Aetna Ins. Co., 317 F. Supp. 238, 246 (E.D. Va. 1970); Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 161 Cal. Rptr. 322, 331 (Cal. Ct. App. 1980). Research, however, has revealed only a handful of cases in which third parties, seeking to enforce a consent judgment which included a covenant not to execute against the insured, have been entitled to recover against an insurer in excess of policy limits. See, e.g., Greater New York Mut. Ins. Co., 85 F.3d 1088 (3d Cir. 1996).

It is important to note that, while the above mentioned cases allowed an injured party to recover in excess of policy limits, all of these cases involved a post-verdict assignment of rights by the insured. Thus at some point prior to the insured's assignment, the insured was faced with the harsh reality that it was financially accountable to the judgment creditor for an outstanding verdict in excess of policy limits. This represents an important distinction from the instant matter, where the insured's liability was effectively extinguished at the very moment it was acknowledged.

In Re: Tutu Wells, 78 F. Supp. 2d at 346 (emphasis added).

Moreover, Kobbeman v. Oleson, 1998 SD 20, 574 N.W.2d 633 (1998), a case relied on by Strahin in his brief, contradicts Strahin's assertion that "[i]t should make no difference whether an assignment of a Shamblin claim precedes or follows an excess verdict[,]", *Brief of the Appellant at 22*, and actually supports a finding that the timing of the assignment must be considered in determining whether the essential legal elements of a Shamblin claim exist. In Kobbeman, the Supreme Court of South Dakota, also focusing on the timing of an assignment, distinguished between cases alleging bad faith refusal to settle and cases alleging failure to procure insurance. Pre-judgment assignments of an insured's claims for bad faith have been disapproved. Kobbeman, 574 N.W.2d at 638. Thus, the Kobbeman court observed:

In bad faith refusal to settle cases, a rule mandating postjudgment assignment is more imperative because, in most instances, no cause of action solidifies until judgment

is rendered against the insured. On the other hand, in failure to procure insurance cases, claims may reasonably arise long before a judgment. We conclude, with assignments of causes of action for failure to procure insurance, a judgment establishing a loss is critical, but its timing is not.

Id. The case *sub judice* involves an alleged bad faith failure to settle on the part of Farmers & Mechanics, not an alleged failure to procure insurance.

Texas has a doctrine that is very similar to Shamblin: when a insurer wrongfully refuses a settlement offer which would relieve the insured of personal liability, the insured has a cause of action against the insurer. See G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex Comm'n App. 1929, holding approved), Hernandez v. Great American Ins. Co of New York, 464 S.W.2d 91 (Tex. 1971). Although phrased somewhat differently, the Stowers doctrine also focuses on whether the insured's personal assets were at stake. In fact, the Stowers duty is not activated unless three (3) prerequisites are met: (1) the claim against the insured is within the scope of coverage; (2) a demand within policy limits is made; and, (3) terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. Willcox v. American Home Assurance Co., 900 F. Supp. 850 (S.D. Tex. 1995). Thus, the Willcox court held:

The existence of the covenant not to execute, however, negates the right to recover in excess of policy limits. "An insurer does not escape its contractual obligations with a covenant not to execute, but a successful covenant not to execute prevents any injury that could give rise to a *Stowers* claim."

Willcox, 900 F. Supp. at 859. Accordingly, under such circumstances, the Willcox court found that summary judgment in favor of the insurance carrier was appropriate.

The court, in In Re: Tutu Water Wells, cited the rationale of Willcox with approval, finding that the plaintiff was precluded from seeking redress from the insurance carrier for amounts

in excess of the policy as the insured never suffered an actual injury in excess of his coverage limits, i.e., no harm to the insured. The court explained:

The plaintiff, nevertheless, contends that Morgan [the insured] is still damaged in the amount of the policy excess because technically a judgment has been recorded against him. Texaco cites cases which distinguish the instant agreement, which involved a covenant not to execute, from those in which an assignment was procured via a release, a situation which courts have rejected as a basis for excess liability. See, e.g. Romstadt v. Allstate Ins. Co., 844 F. Supp. 361, 366-67 (N.D. Ohio. 1994). **The Court finds this a distinction without a difference, since the agreement involved in the instant matter provides no circumstances by which Morgan [the insured] would be held liable in excess of the policy limits. Thus, for all intents and purposes, the covenant operated as a release and Morgan was never actually damaged by the \$16,628,392 judgment he consented to.** Therefore, the Court concludes that, like the plaintiff in Willcox, Morgan [the insured] never suffered an actual injury in excess of his coverage limits and therefore the plaintiff is precluded from seeking redress from Cigna for amounts in excess of the policy.

In Re: Tutu Water Wells, 78 F. Supp. 2d at 433 (emphasis added).

Also addressing the requirement of subsequent harm to the insured, the United States Court of Appeals for the Fifth Circuit, in Foremost County Mutual Ins. Co., applying Texas law, focused on the covenant not to execute and cogently illustrated the policy of protecting the hard-won personal assets of the insured. Strahin's appellate brief, although seeking to discredit virtually all of the cases originally cited by Farmers & Mechanics in its response to the petition for appeal, does not address the court's analysis in Foremost County Mutual Ins. Co. whatsoever. Nonetheless, the Fifth Circuit's discussion regarding assignments and covenants not to execute is illustrative. As part of the covenant not to execute, the plaintiffs in Foremost County Mutual Ins. Co. agreed not to execute any judgment against the insured and, in return, the insured assigned any rights he may have had against his automobile liability insurance carrier. The insured was insured at the time of the accident by both a general liability policy issued by Home Indemnity Company ("Home") and an

automobile insurance policy issued by Foremost County Mutual Insurance Company ("Foremost"). Both carriers refused settlement offers within their respective policy limits. The covenant not to execute was prepared by Home's attorneys. In a subsequent action between the insurance carriers, the court found that the covenant not to execute released Home's insured from all legal obligations to pay. Thus, Home's decision to reject the settlement offer never resulted in any injury to its insured. In addressing this particular issue, the court noted that an insurer's "refusal to accept a settlement offer does not, without more, give rise to a cause of action; there must be not only negligent refusal to settle by the insurer but also subsequent harm to the insured." Foremost County Mutual Ins. Co., 897 F.2d at 757. Since the insured was protected by a covenant not to execute, the insurer's "decision to reject a settlement offer never resulted in any injury to its insured." Id. Hence, Home did not breach its Shamblin-like duty to its insured to settle and, therefore, had no obligation to the plaintiffs/assignees beyond those limited obligations that may have arisen directly under the policy of insurance. Id., 897 F.2d at 757-758.

In the case *sub judice*, Strahin's Amended Complaint clearly demonstrates that he, Sullivan and Erie, as a part of the settlement between Strahin and Sullivan, executed an Assignment, under which Sullivan assigned to Strahin all of his rights against Farmers and Mechanics, including any claims for bad faith. In return for this Assignment, among other things, Strahin **agreed not to execute on the personal assets of Sullivan to satisfy any judgment that might be obtained against Sullivan.** Therefore, as Sullivan, Farmers and Mechanics' insured, was released from personal liability in that his personal assets were not at stake in any judgment later rendered against him in favor of Strahin, Farmers and Mechanics could not have breached any duty of settlement to him, or to Strahin, to the extent that the Strahin possesses Sullivan's rights, as the insured was fully

protected from personal liability exposure. In that regard, there is no *prima facie* bad faith as contemplated by Shamblin, as Sullivan possessed no personal liability exposure. As there was no personal liability exposure to Farmers and Mechanics' insured, the Shamblin claim clearly fails, as a matter of law. Consequently, the Circuit Court of Barbour County, West Virginia committed no error in granting Farmers and Mechanics' motion for summary judgment.

Further demonstrating the fact that Sullivan was not personally exposed is the fact that, not only did the Assignment and Covenant Not to Execute release Sullivan from any personal liability or exposure, but the Assignment and Covenant Not to Execute prevented Strahin from ever recording a judgment against Sullivan. See *Assignment at ¶ VII*. This key factor is even different than that the situation before the court in In Re: Tutu Water Wells, *supra*, as the covenant not to execute did not preclude the plaintiff from recording the excess judgment. Even under that scenario, the district court found that the insured never suffered any actual injury in excess of his policy limits. *Id.*, 78 F. Supp. 2d at 433. In this case, the Assignment clearly contained language precluding Strahin from recording any judgment against Sullivan. Thus, the elements of a Shamblin cause of action are simply not satisfied with the facts of the instant matter as the insured had no personal exposure with a verdict, alleviating the ability of Strahin to establish a *prima facie* cause of action against Farmers and Mechanics under a Shamblin theory.

As noted at the outset, Strahin's appellate brief contains the implied fallacy that Farmers and Mechanics somehow asserted (and the Circuit Court found) that Sullivan could not assign his Shamblin cause of action to Strahin. See *Brief of the Appellant at 11-13*.⁴ This, however,

⁴Strahin's brief uses interchangeably the term "Bad Faith" with a Shamblin cause of action. However, a Shamblin claim is not synonymous with a statutory bad faith claim under the West Virginia Unfair Claims Settlement Practices Act, W. Va. Code § 33-11-4(9), which statutory bad faith claim has also

is a complete mis-characterization of Farmers and Mechanics' motion for summary judgment presented to the Circuit Court below. To the contrary, Farmers and Mechanics did not assert that Sullivan could not assign his purported Shamblin cause of action to Strahin. Instead, when an insured, such as Sullivan, assigns his Shamblin rights to an assignee, as in the instant matter, he conveys only those rights to the assignee against the insurer which he actually possesses. This is actually conceded later on in Strahin's brief when he acknowledges that "[t]he assignee 'steps into the shoes' of the assignor and takes the assignment subject to all prior equities between previous parties. His situation is not better than that of the assignor." *Brief of the Appellant at 12*. However, the mere assignment of the insured's rights does not entitle the assignee to automatic recovery. Much like what would be required of the insured, the assignee is required to satisfy all of the essential elements of the cause of action before being able to prevail on the cause of action.

Indeed, the Assignment in this matter is analogous to a conveyance of real property between two (2) parties. When two (2) individuals convey real property between seller and buyer, the same can be done through the utilization of a quit claim deed, special warranty deed or a general warranty deed. With a quit claim deed, the seller is conveying to the buyer all of his interest in the

been asserted by Strahin in his Amended Complaint. The compensatory damages recoverable for a successful statutory bad faith claim under the Act include increased costs and expenses, including increased attorney's fees resulting from an insurance carrier's use of an unfair business practice in the settlement or failure to settle the underlying claim, net economic loss occasioned by the delay in settlement, interest and annoyance and inconvenience. McCormick v. Allstate Insurance Company, 197 W. Va. 415, 475 S.E.2d 507, 515 (1996). In order to so recover, however, the plaintiff must prove violations of specific requirements of the statute with such frequency as to indicate a general business practice of the carrier. Dodrill v. Nationwide Mutual Insurance Company, 201 W. Va. 1, 491 S.E.2d 1 (1996). The damages recoverable for a successful statutory bad faith claim under the Act, whether first- or third-party, do not include recovery of an excess verdict as provided by Shamblin. Finally, as previously noted, a "bad faith" claim can also include a claim for breach of the duty to defend arising from the common law duty of good faith and fair dealing. This, too, is typically referred to as a "bad faith" claim, but does not include any excess verdict as required by Shamblin.

property, but is not warranting what interest is actually being conveyed. In conveying a quit claim deed, the seller has no obligation to defend the title conveyed as the seller is merely conveying what he has, without any warranty. In essence, the seller is conveying whatever he has. With a general warranty deed, the seller not only conveys to the buyer all of his interest to the property, but warrants the title being conveyed and is obligated to defend the title forever. *See* West Virginia Code § 36-3-1.

The Assignment and Covenant Not to Execute in this matter is analogous to a quit claim deed conveyance in that Sullivan assigned to Strahin all of his interests, whatever those interests were, against Farmers and Mechanics. While Sullivan transferred his rights, whatever those rights were to Strahin, at no time did Sullivan warrant the quality of what he was assigning to Strahin. The mere conveyance or assignment of the cause of action did not and could not constitute a conveyance of an entitlement to prevail on the claim. Therefore, although Sullivan assigned his Shamblin cause of action to Strahin, Strahin's purported cause of action must satisfy all of the essential elements of a cause of action before he is entitled to recovery for his claim.⁵ However as demonstrated above by the undisputed facts, as found by the Circuit Court, Strahin's Shamblin claim failed and fails to meet the necessary elements of such a cause of action. Therefore, Farmers and Mechanics was entitled to summary judgment, as a matter of law, as to Count I of the Amended

⁵This same analysis would apply to Sullivan's assignment to Strahin of a first-party claim under the West Virginia Unfair Claims Settlement Practices Act. The mere fact that Sullivan assigned such a purported claim to Strahin does not mean that Sullivan was warranting the quality of any such claim or that Strahin has an automatic entitlement to recover on this claim against Farmers & Mechanics. To the contrary, Strahin will still be required to prove the essential legal elements of such a claim, including the general business practice requirement mandated by W. Va. Code § 33-11-4(9).

Complaint. Consequently, the Circuit Court of Barbour County, West Virginia committed no error in granting Farmers and Mechanics' motion for summary judgment.

Strahin's arguments to this Court are further flawed in that he asserts that the assignment of Sullivan's Shamblin rights was the "very purpose of the assignment." *Brief of the Appellant at 17*. This assertion is not, however, supported by the transcript of the February 7, 2001 hearing, at which hearing the parties sought Circuit Court approval of the Assignment and Covenant Not to Execute. Indeed, before the Circuit Court below, Strahin relied upon the statement of his then counsel, H. Gerard Kelley, that the recovery of a verdict against Sullivan's homeowner's carrier was one of the things the agreement was supposed to do. Given that Sullivan's personal assets were protected and Strahin, by his actions, could not recover against Sullivan, the only recovery available to Sullivan was the value of Sullivan's insurance policy. Thus, the statement by Mr. Kelley does not make it clear that the Assignment included Shamblin rights. And, again, the February 7, 2001 hearing transcript does not support such assertions.

In the case *sub judice*, it is not disputed (and has not been) by Farmers and Mechanics that Sullivan could assign a Shamblin claim to Strahin in exchange for the covenant not to execute. However, the mere conveyance or assignment of such a claim did not and could not constitute an entitlement to prevail on the claim. Therefore, although Sullivan assigned his Shamblin cause of action to Strahin, this purported cause of action must satisfy all of the essential elements of a cause of action. However, as the Circuit Court correctly found, the undisputed facts demonstrate that Strahin's Shamblin claim fails to meet the necessary elements of such a cause of action. Accordingly, the Circuit Court of Barbour County, West Virginia correctly granted Farmers and Mechanics' motion for summary judgment.

II. The Circuit Court's Granting of Summary Judgment to Farmers & Mechanics Was Proper for the Additional Reason That When an Insured Is Completely Protected from Personal Liability to a Third-party Claimant by a Covenant Not to Execute, the Insurance Carrier Is Not under Any Duty to Pay the Excess Judgment Against the Insured since the Insured Is No Longer Legally Obligated to Pay the Judgment.

Contracts of insurance are contracts of indemnity. Per the terms of the applicable insurance policy, the insurer will indemnify the insured for all sums which the insured becomes legally liable. "A defendant's insurance company's liability is derivative in nature; therefore, its liability depends on whether or not its insured is liable to the plaintiff." Buchanan v. Buchanan, 83 N.C. App. 428, 350 S.E.2d 175, 176 (N.C. Ct. App. 1986). When an insured is protected from any liability arising from a judgment, he cannot be deemed "legally obligated to pay" anything to a plaintiff who holds a judgment against him. These courts give the "legally obligated to pay" language a practical construction: an insured protected by a covenant not to execute has no compelling obligation to pay any sum to the injured party; thus, the insurance policy imposes no obligation on the insurer. Stubblefield v. St. Paul Fire & Marine Insurance Company, 267 Ore. 397, 517 P.2d 262 (1973). *See also*, Great Divide Ins. Co. v. Carpenter, 79 P.3d 599 (Alaska 2003)(covenant not to execute ordinarily means the insured has not suffered a personal loss); Lida Manuf. Co., Inc. v. Cigna Ins. Co., 116 N.C. App. 592, 448 S.E.2d 854 (N.C. Ct. App. 1994), *review denied*, 339 N.C. 738, 454 S.E.2d 653 (1995)("This Court, however, along with other states, has determined that when an insurance policy contains language such as 'legally obligated to pay,' an insurer has no obligation to an injured party where the insured is protected by a covenant not to execute."); Oregon Mutual Ins. Co. v. Gibson, 88 Ore. App. 574, 746 P.2d 245 (Ore. Ct. App. 1987). Thus, a line of authority reasons that in situations in which the insured has no obligation to pay, neither does the insurer. *See, e.g.*, Bendall v. White, 511 F. Supp. 793 (N.D. Ala. 1981); Huffman

v. Peerless Ins. Co., 17 N.C. App. 292, 193 S.E.2d 773 (N.C. Ct. App. 1973), *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973).

Moreover, even those courts that have held that a covenant not to execute against an insured, given to the plaintiff in the underlying case, does not completely absolve an insurance carrier from liability, have also found that the existence of such a covenant precludes any recovery from the insured **in excess** of the policy limits. See Whatley v. City of Dallas, 758 S.W.2d 301 (Tex. Ct. App. 1988). Indeed, in Willcox v. American Home Assurance Co., *supra*, the court held:

The existence of the covenant not to execute, however, negates the right to recover in excess of policy limits. "An insurer does not escape its contractual obligations with a covenant not to execute, but a successful covenant not to execute prevents any injury that could give rise to a *Stowers* claim."

Willcox, 900 F. Supp. at 859. See also, In Re: Tutu Water Wells, 78 F. Supp. 2d at 433 (the covenant operated as a release and the insured was never actually damaged by the judgment; court concluded that, like the plaintiff in Willcox, the insured never suffered an actual injury in excess of his coverage limits and, therefore, plaintiff was precluded from recovering the excess from the insurer).

The Circuit Court found that the Assignment and Covenant Not To Execute executed by the parties in this case unambiguously stated that Sullivan is not legally obligated to pay anything to the plaintiffs. In fact, plaintiffs "promise covenant and agree to not execute upon **any** of the personal assets of Earl Sullivan to recover payment to satisfy **any judgment** which may hereinafter be acquired by them against Earl Sullivan." See *Assignment at ¶ IV (emphasis added)*. Furthermore, the plaintiffs "are now and forever prohibited from making **any attempt of any kind** to satisfy any judgment obtained from the personal assets of Earl Sullivan" and are further prevented from

recording the judgment against Sullivan. *See Assignment at ¶ VI (emphasis added)*. Furthermore, the Assignment, by its very terms, preserved only the right in Strahin "to collect against Farmer's [sic] & Mechanics Policy, Farmers & Mechanics Mutual Insurance Company, and Nationwide." *See, e.g., Far West Federal Bank, S.B. v. Transamerica Title Ins. Co.*, 99 Ore. App. 340, 781 P.2d 1259 (Ore. Ct. App. 1898)(a promise to execute only to the extent that an insurer is liable terminates the insured's liability and there is no loss that the insured could sustain). This agreement is exactly the type of unconditional covenant which the Oregon Court found dispositive on the issue of the insured's legal obligation to pay any judgment. *Gibson*, 746 P.2d at 247. In fact, the Circuit Court concluded that Sullivan, as a result of the Assignment and Covenant Not to Execute:

had no damages. The Court finds that as a result of him having no damages, Farmers and Mechanics likewise had no damages, because they owed him nothing. He couldn't lose anything. He couldn't be held responsible for the excess verdict. That's the only way Farmers and Mechanics could be held liable is if he was held liable. It had to be from him or through him. If he couldn't be liable then his insurance carrier couldn't be liable for the excess verdict . . .

*April 8, 2005 hearing transcript at 30.*⁶ Although Sullivan was unconditionally protected from any liability whatsoever, Farmers and Mechanics nonetheless tendered the \$100,000.00 to Strahin, and applicable interest, following this Court's opinion in *Strahin v. Cleavenger*, *supra*. However, the

⁶In addition to its argument that the necessary and essential legal elements of a *Shamblin* claim were lacking, Farmers and Mechanics' motion for summary judgment further asserted that, since there was no legal obligation on the part of its insured, Earl Sullivan, to pay the judgment in this matter, pursuant to the Assignment and Covenant Not to Execute, then Farmers and Mechanics likewise was under no duty to pay the excess judgment against its insured. This argument was clearly set forth in Farmers and Mechanics' initial memorandum of law in support of its motion for summary judgment, at pages 11 through 14, before the Circuit Court below. Strahin's response in opposition to Farmers and Mechanics' motion for summary judgment wholly failed to refute this argument or any of the cases relied on by Farmers and Mechanics in support of said argument. Indeed, Strahin completely failed to even address this particular argument. Nonetheless, the Circuit Court's June 17, 2005 Order found that "the Assignment and Covenant Not to Execute in this case precludes any recovery from Farmers & Mechanics in excess of its policy limits." *See June 17, 2005 Order at 15, ¶ 26, in part.*

Assignment and Covenant Not to Execute in this case precludes any recovery from Farmers and Mechanics in excess of its policy limits. Accordingly, there is no indemnification necessary and no duty on behalf of Farmers and Mechanics to pay any sums in excess of the policy limits of its insurance contract with Sullivan to the plaintiffs. Thus, for these additional reasons, summary judgment in favor of Farmers and Mechanics was clearly appropriate.

Still, other courts look to the language of the covenant to determine whether an insured/tortfeasor remains legally obligated on a judgment. Lancaster v. Royal Ins. Co. of America, 302 Ore. 62, 726 P.2d 371 (1986). Looking at the language in the covenant in Kobbeman, the court observed that the assignment stipulated nothing about whether a docketed judgment would create a lien on the insured's real property and, further, that the insured might also suffer diminishment of his credit rating. Kobbeman, 574 N.W.2d at 636. However, here, the Assignment and Covenant Not to Execute clearly contemplated that any judgment against Sullivan could not be recorded and was, in fact, self-extinguishing.

In Oregon Mutual Ins. Co. v. Gibson, *supra*, the court looked to the language of the covenant:

"The covenantor executes this document as a covenant not to enforce any judgments in favor of covenantor against the covenantee arising out of the subject of the pending lawsuit hereinabove mentioned, irrespective of the amount of the judgment . . . The covenantor agrees not to in any manner enforce or attempt to enforce any judgment against any of the assets of the covenantee, except his liability insurance.

Gibson, 746 P.2d at 247. Examining the foregoing language, the Court of Appeals of Oregon concluded that

the language of the covenant involved unambiguously states that the insured is not legally obligated to pay plaintiff any more than what was paid on his behalf by

Oregon Mutual. As in Stubblefield v. St. Paul Fire & Marine, *supra*, it unconditionally insulated the insured from any liability over that amount.

Id. Thus, under the covenant, the court found that the insured could never be required to pay any more than the coverage under the existing insurance. Id.

In this regard, Strahin asserts that the Assignment and Covenant Not to Execute “by its very terms is a settlement agreement – not a release.” Looking at the plain language of the Assignment and Covenant Not to Execute, however, it is clear that, despite the term or phrase affixed to the document itself, the purpose of the document was to insulate Sullivan from any and all personal liability whatsoever. This distinction Strahin attempts is nonetheless a “distinction without a difference” since the agreement involved provides no circumstances under which Sullivan would be held liable in excess of the policy limits. In Re: Tutu Water Wells, 78 F. Supp. 2d at 433. Thus, “for all intents and purposes, the covenant operated as a release and [Sullivan] was never actually damaged” by the verdict returned against him. Thus, like the plaintiffs in Willcox and In Re: Tutu Water Wells, Sullivan, and by virtue of the assignment, Strahin, never suffered any actual injury in excess of his coverage limits. Id.

Furthermore, holding insurers liable for a judgment even when an insured is not legally liable for the judgment encourages collusion between the insured and the plaintiff to raid the insurance proceeds. When the insured is protected by the covenant prior to the entry of judgment, as in this case, the insured “loses the incentive to contest his liability or the extent of the injured party’s damages either in negotiations or at trial.” Freeman v. Schmidt Real Estate & Ins., Inc., 755 F.2d 135, 139 (8th Cir. 1985)⁷; Pruyn v. Agricultural Ins. Co., 36 Cal. App. 4th 500, 42 Cal. Rptr.

⁷Strahin asserts that this is “[t]he leading case cited by Farmers & Mechanics . . . wherein the Eighth Circuit held that an insured protected by a covenant not to execute has no compelling obligation to pay any

2d 295 (Cal. Ct. App. 2d Dist. 1995), *as modified* (July 12, 1995), *as modified on denial of reh'g*, 36 Cal. App. 4th 500, 42 Cal. Rptr. 2d 295 (July 19, 1995) ("With no personal exposure the insured has no incentive to contest liability or damages. To the contrary, the insured's best interests are served by agreeing to damages in any amount as long as the agreement requires the insured will not be personally responsible . . ."). This lack of motivation may lead to a lackluster effort to defend at best, or wholesale cooperation with the plaintiff's case at worst. In any event, the covenant has great potential to undermine the ability of the insurer to provide a vigorous defense.

Despite the protection against collusion, a number of states still hold insurers responsible for judgments rendered against insureds protected by covenants not to execute. However, virtually all of these cases impose this obligation only when there has been a breach by the insurer of the duty to defend against a lawsuit and the insurer, therefore, "abandoned" its insured on the basis of no coverage.⁸ In Guillen v. Potomac Insurance Company of Illinois, 203 Ill. 2d 141, 785 N.E.2d 1 (2003), the court looked at the construction of the "legally obligated to pay" language as a technical rather than a practical one:

sum to the injured party; thus, the insurance policy imposes no obligation on the insurer." *Brief of the Appellant at 18*. The characterization by Strahin of Farmers & Mechanics' legal authority is certainly appreciated; however, it is not the case. To the contrary, one would be hard-pressed to assert that a case relied on by a party is the "leading case" when that particular case was mentioned on a single occasion on page 26 of a twenty-seven page brief. Furthermore, Strahin asserts that Freeman is no longer good law, yet he relies on cases that in turn rely on Freeman.

⁸*See, e.g.,* USF Ins. Co. v. Mr. Dollar, Inc., 175 F. Supp. 2d 748 (E.D. Pa. 2001); In Re: Tutu Water Wells Contamination Litigation, *supra*; Willcox v. American Home Assur. Co., *supra*; Glenn v. Fleming, 799 P.2d 79 (Kan. 1990); Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995); Sentinel Ins. v. First Ins., 875 P.2d 894 (Hawaii 1994); Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982); Griggs v. Betram, 443 A.2d 163, 174-175 (N.J. 1981); Pruyn v. Agricultural Ins. Co., *supra*; Ackerman v. Travelers Indem. Co., 456 S.E.2d 408 (S.C. App. 1995); Kagele v. Aetna Life and Cas. Co., 698 P.2d 90 (Wash. App. 1985); Steil v. Florida Physicians' Ins. Reciprocal, 448 So. 2d 589 (Fla. App. 2d Dist. 1984); American Family Mut. Ins. Co. v. Kivela, 408 N.E.2d 805 (Ind. App. 1st Dist. 1980); State Farm Mutual Automobile Ins. Co. v. Paynter, 593 P.2d 948 (Ariz. App. Div. 1 1979).

The rationale supporting this technical construction of the “legally obligated to pay” language is that “an insurer who has abandoned the insured by refusing to defend a claim should not be allowed to ‘hide behind’ the policy language.” Gainsco [Ins. Co. v. Amoco Prod. Co.], 53 P.3d 1051 (Wyo. 2002)] 53 P.3d at 1060-61 (and cases cited therein). Further, some courts have observed that if the “legally obligated to pay” language were construed in favor of the insurers, it would defeat the very purpose of the settlement agreement entered into by the insured . . . And, since the insured has the right to protect itself after the insurer breaches its duty to defend, public policy generally supports giving a technical construction to the “legally obligated to pay” language . . . Thus, the prevailing view is that a liberal construction of the words “legally obligated to pay” in favor of the insured is appropriate, **once the insurer has breached its duty to defend.**

Guillen, 785 N.E.2d at 13 (further citations omitted)(emphasis added). The Guillen court did use the technical construction of the “legally obligated to pay” language, finding that the insureds remained legally obligated to pay despite the existence of a covenant not to execute, because the insurance carrier breached its duty to defend the insured. Id.

Also, in The Midwestern Indem. Co. v. Laikin, 119 F. Supp. 2d 831 (S.D. Ind. 2000), the court, although rejecting the Texas approach in State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996), was concerned with the “abandoned” insured, i.e., those cases where the insurer neither defended under a reservation of rights nor sought a declaratory judgment ruling as to coverage. Indeed, the Laikin court observed:

The Texas approach essentially forces the abandoned insured (recall that all these cases assume the insurer wrongfully denied coverage and often a defense as well) either to pay out of her own pocket for the costs of defense up through a full trial, or to wait until coverage issues have been resolved definitely by the courts.

Laikin, 119 F. Supp. 2d at 842. Farmers and Mechanics’ insured was not “abandoned” in this case.

However, in cases, such as the one *sub judice*, where the insurer provided a vigorous defense to its insured and did not abandon its insured, courts have not required the insurer to pay when a covenant not to execute has been entered into and the insured is no longer legally obligated

to pay the judgment. See Clock v. Larson, 564 N.W.2d 436 (Iowa 1997) (indicating that providing a defense to an insured is a significant factor to consider on whether insurer is liable in the face of a covenant not to execute). The defense obligation is one of two important factors considered by the Iowa Supreme Court in Clock when distinguished from the facts of Red Giant. The other factor was whether the agreement constituted a release and not just a covenant not to execute. See In Re: Tutu Water Wells, 78 F. Supp. 2d at 433 (where the court found that an agreement, which involved a covenant not to execute, as opposed to an assignment which was procured via a release, was “a distinction without a difference” since the agreement involved provided no circumstance by which the insured would be held liable in excess of the policy limits). However, the court did not pass judgment on whether one of those factors standing alone would suffice to negate the protection afforded under the covenant not to execute. Since Farmers & Mechanics did not breach its duty to defend, the “majority” opinions relied upon by Strahin are inapposite in this case. To the contrary, Farmers & Mechanics fulfilled its defense obligation to Sullivan even after the Assignment and Covenant Not to Execute was executed. Thus, as there is no legal obligation on the part of the insured to pay the judgment in this matter, the Shamblin ruling does not apply and the insurer is not legally obligated to pay the excess verdict.

Finally, many of the cases cited above (regarding the imposition of an obligation on the part of the insurer for an excess verdict in those circumstances where the insurer breached its duty to defend the insured) are also cited by Strahin in his brief for the proposition that the “majority” rule “considers a covenant not to execute ‘merely a contract and not a release.’” *Brief of the Appellant at 15*. Strahin then attempts to assert that those cases relied upon by Farmers & Mechanics (in its response to the petition for appeal) are inapplicable because they involved consent

judgments and not excess verdicts. *Brief of the Appellant at 18* ("the minority rule relied upon by *Farmers & Mechanics* is only applicable to consent judgment cases); at 19 ("... all the cases cited by *Farmers & Mechanics* are distinguishable from the instant matter because none of them involves an excess verdict."). Yet, many of the cases, including the "landmark" cases, relied on by Strahin also involved consent judgments as opposed to excess verdicts and, further, included failures on the part of the insurance carrier to meet its defense obligation. Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995)(consent judgment); Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 128 (D.C. Cir. 1989)(applying North Carolina law)(insurance carrier refused to provide a defense, resulting in a default judgment against the insured); Wanger v. Lerol, 670 N.W.2d 830 (N.D. 2003)(\$200,000.00 stipulated consent judgment; also distinguishable because the insurer, although initially providing a defense for the insured, later withdrew the defense and abandoned the insured); Guillen v. Potomac Ins. Co., *supra* (insurer refused to provide a defense to the insured); Stateline Steel Erectors, Inc. v. Shields, 150 N.H. 332, 837 A.2d 285 (2003)(stipulated consent judgment, not excess verdict); Ayers v. C&D General Contractors, 269 F. Supp. 2d 911 (W.D. Ky. 2003)(\$1million consent judgment; court concluded that, while Kentucky courts look favorably upon consent judgments coupled with covenants not to execute, the court would not look at the recovery of an excess verdict *per se* but rather whether "bad faith" claim should have been subject to a summary judgment motion); Franco v. Selective Ins. Co., 184 F.3d 4 (1st Cir. 1999)(applying Maine law)(consent judgment of \$500,000; also distinguishable because the insured refused to provide a defense to its insured); Tip's Package Store v. Commercial Ins. Managers, Inc., 86 S.W.3d 543 (Tenn. Ct. App. 2001)(involved a consent judgment, not an excess verdict); Campione v. Wilson, 661 N.E.2d 658 (Mass. 1996)(consent judgment of \$1.75 million); McLellan v. Atchison Ins.

Agency, Inc., 912 P.2d 559 (Haw. Ct. App. 1996)(\$350,000 stipulated consent judgment). Thus, Strahin's assertion (that the cases relied on by Farmers & Mechanics are inapplicable because they involved consent judgments) is unavailing, particularly when Strahin, too, cites cases involving consent judgment, not excess verdicts.

Specifically, Strahin cites Red Giant Oil Co. v. Lawlor, *supra*, as a "landmark case" as support for reversal of the Circuit Court's summary judgment ruling in favor of Farmers & Mechanics. Interestingly, however, Red Giant is distinguishable from the case *sub judice*. Notably, too, Strahin requests that this Court disregard the cases relied on by Farmers & Mechanics because the said cases addressed consent judgments, not excess verdicts, and, thus, are inapposite. However, Red Giant, too, involved a stipulated consent judgment. Moreover, the rationale of Red Giant is further distinguishable from the instant matter, as was elaborated on by the Supreme Court of Iowa in Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637 (Iowa 2000), when the Court distinguished application of Red Giant from the facts in Kelly:

In Red Giant, we held that, where an insurance company refuses to defend the insured against a claim covered by the policy, the insured is free to settle with the injured party by stipulating to the entry of a judgment that is collectible only from the insurer. [Red Giant,] 528 N.W.2d at 531. The right of the insured in Red Giant to settle the claim against it resulted from the insurance company's refusal to defend .

* * *

Unlike the insurer in Red Giant, Iowa Mutual did not breach its duty to provide a defense. The undisputed facts show that Iowa Mutual employed an attorney to defend McCarthy [the insured] against the wrongful death claim asserted by the estate.

Kelly, 620 N.W.2d at 641-642.

Gray v. Grain Dealers Mut. Ins. Co., *supra*, also cited by Strahin as a “landmark case,” is also easily distinguishable as the insurance company flatly refused to provide any defense whatsoever for the insured, resulting in a default judgment against the insured, which judgment was later determined to be \$334,000.00. The court, sitting in diversity, was also asked to apply North Carolina law. It recognized the Huffman case decided in 1973, but chose to apply a decision in Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958), fifteen years prior to Huffman. Also of importance, however, is the Court’s focus on the timing of the judgment as it related to the “legally obligated to pay” language. Indeed, the Gray court observed, “It seems rather clear to us that after the judgment but before the assignment and release, Speed [the insured] was legally responsible to pay the judgment, whether or not he ever intended to pay. Gray, 871 F.2d at 1132.

The sum of the above legal authority demonstrates that a covenant not to execute, coupled with an assignment, will offer protection to the insured, and likewise the insurer, from an excess verdict. This protection is extended to insurance carriers in those instances where the carrier has not breached its duty to defend. In such a circumstance, then, if the language of the covenant involved unambiguously states that the insured is not legally obligated to pay plaintiff any more than what was paid on his behalf by the insurer, then the covenant unconditionally insulates the insured from any liability over that amount. Thus, under the covenant, the insured could never be required to pay any more than the coverage under the existing insurance. And, when the insured is protected from any liability arising from a judgment, the insured has no obligation to pay and neither does the insurer. *See, e.g., Oregon Mutual Ins. Co. v. Gibson, supra.*

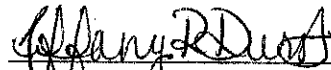
Conclusion

In conclusion, the undisputed facts in this case, as clearly found by the Circuit Court, amply demonstrate that Strahin's purported Shamblin claim fails, as a matter of law, as Sullivan could only assign to Strahin whatever rights he may have had against Farmers and Mechanics. As the Assignment and Covenant Not to Execute fully insulated Sullivan from any personal exposure, he, himself, could not assert a Shamblin claim against Farmers and Mechanics because there was no subsequent harm to him as a result of the fact that Farmers and Mechanics did not settle the claims against him within policy limits. Because Sullivan had no valid Shamblin claim, neither does Strahin pursuant to the Assignment. Moreover, the Assignment and Covenant Not to Execute precludes any recovery from Farmers and Mechanics in excess of the policy limits. These policy limits have been tendered by Farmers and Mechanics to Strahin. He is entitled to no further monies from Farmers and Mechanics. Finally, public policy dictates that the position advanced by Strahin would place an insurance carrier, such as Farmers and Mechanics, in the untenable position of meeting a policy limits settlement demand arguably at the very inception of a claim. Indeed, a plaintiff's attorney could make a policy limits demand at the outset of a claim. In such a circumstance, the insurance carrier would either be forced to meet the policy limits demand, without first having an opportunity to investigate the claim against its insured, or face the possibility of a Shamblin claim much later on in the claim. Such a scenario is not sound public policy, particularly when, in this circumstance, the insured's personal assets were not at stake at the time the excess verdict was rendered. For all of these reasons, then, the Circuit Court's June 17, 2005 Order correctly granted Farmers and Mechanics' motion for summary judgment. Accordingly, it is respectfully submitted that this Court affirm the Circuit Court's June 17, 2005 Order, which only

addressed Strahin's claim against Farmers and Mechanics under Shamblin – remember, a ruling by this Court affirming the summary judgment Order of the Circuit Court will not leave Strahin without any recourse under the Assignment and Covenant Not to Execute as he also received, via the Assignment, an other common law and statutory bad faith claims against Farmers and Mechanics, which are presently pending before the Circuit Court below.

Respectfully submitted this 11th day of October, 2006.

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No. 33091

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

DANIEL R. STRAHIN,

Appellant,

v.

Civil Action No.: 99-C-7

**FARMERS & MECHANICS INSURANCE
COMPANY OF WEST VIRGINIA, INC.,**

Appellee.

FROM THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
THE HONORABLE ALAN D. MOATS, CIRCUIT JUDGE

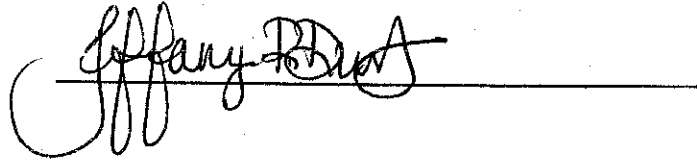
CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2006, I served the foregoing **BRIEF OF APPELLEE, FARMERS AND MECHANICS MUTUAL INSURANCE COMPANY OF WEST VIRGINIA, INC., IN RESPONSE TO BRIEF OF APPELLANT, DANIEL STRAHIN,** upon all counsel of record via facsimile or by depositing true copies thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Leonard T. Kelley, Esquire
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A handwritten signature in dark ink, appearing to read "Stephen D. Annand", is written over a solid horizontal line. The signature is stylized with large, flowing loops and a prominent initial "S".